

53

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR EXTENSION OF TIME ON BENEFICIAL)
WATER USE PERMIT NO. 53070-s41G)
BY GLENDA AND GERALD OHS)

FINAL ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the April 7, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

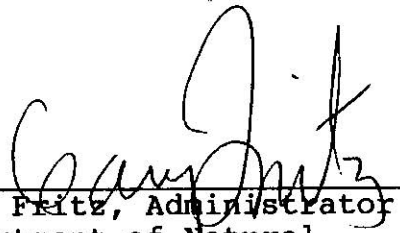
The Application for Extension of Time to Perfect Beneficial Water Use Permit No. 53070-s41G by Gerald and Glenda Ohs is hereby granted. The Permittee shall put the water to a beneficial use in the amounts specified in the Permit no later than November 30, 1989, and the Notice of Completion of Permitted Water Development, Form 617, shall be filed with the Department on or before November 30, 1989.

CASE # 53070


NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 25th day of May, 1989.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605



Keith Kerbel, Hearing Examiner
Department of Natural Resources
and Conservation
1537 Avenue D, Suite 105
Billings, Montana 59102
(406) 657-2105

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 25th day of May, 1989, as follows:

Glenda and Gerald Ohs
P.O. Box 152
Harrison, MT 59735

George L. and Gwynn Taylor
P.O. Box 6383
Los Osos, CA 93412

Anna Lee Purdy
508 North 15th
Bozeman, MT 59715

Scott Compton, Field Manager
Bozeman Field Office
1201 East Main
Bozeman, MT 59715

Kathleen A. Cullen
Attorney at Law
P.O. Box 1271
Bozeman, MT 59771-1271



Irene V. LaBare
Legal Secretary

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR EXTENSION OF TIME ON BENEFICIAL) PROPOSAL FOR DECISION
WATER USE PERMIT NO. 53070-S41G)
GRANTED TO GLENDA & GERALD OHS)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on February 17, 1989 in Bozeman, Montana.

Applicant for Extension of Time, Glenda and Gerald Ohs (hereafter referred to as Applicant), appeared in person at the hearing without counsel. Mr. Rhett Hurless appeared as witness for the Applicant.

Objector, Anna Lee Purdy, appeared at the hearing in person. Objectors, George L. and Gwynn M. Taylor, were not present. Objectors, Ms. Purdy and George and Gwynn Taylor, were represented by Counsel, Kathleen Cullen, attorney at law.

Scott Compton and Jan Mack, both with the Bozeman Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, the "Department"), Water Rights Bureau, were present at the hearing.

EXHIBITS

Applicant offered one exhibit:

Applicant's Exhibit 1, a seven page document, prepared by E. Farley Eskelson, P.E. of Bingham Engineering to Mr. Mark Jones of the Federal Energy Regulatory Commission (FERC) dated January 20, 1989, was admitted into the record without objection. This document contains photographs of the inside of the powerhouse, the penstock, and the diversion facility. December of 1988's monthly power production report and progress report are also included.

Neither the Department nor the Objectors offered any exhibits for inclusion into the record in this matter. The Department file containing the Application for Extension of Time, the objections, processing documents, copies of the two previously approved requests for extensions, the temporary extension of time and a copy of a Notice of Completion were made available at the hearing for all parties to examine. No objection was made to the admissibility of any part of the file. Therefore, the Department file is included in the record of this matter in its entirety.

Having reviewed the record in this matter and being fully advised in the premises, the Examiner proposes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. Section 85-2-312(3), MCA, states in pertinent part:

The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party.

2. On January 11, 1984, Permit to Appropriate Water No. 53070-s41G was granted to Glenda and Gerald Ohs with a priority date of June 28, 1983. The permit authorized the Applicant to divert 10.0 cfs up to 7,238.0 acre-feet of water per annum from North Willow Creek for power generation from January 1 to December 31, inclusive, of each year.

3. Under the terms of the permit as issued, the Applicant was required to have completed the appropriation works, have

applied water to a beneficial use as specified in the permit and file a Notice of Completion of a Permitted Water Development Form on or before December 1, 1984.

4. Since the issuance of the permit, the Applicant has requested, in two separate actions, extensions for additional time. The Applicant was granted his first request for an extension of time on October 2, 1984, and given until December 1, 1986, while the second request for additional time was granted on November 24, 1986, and granted until November 30, 1988, to complete the permitted development and put the water to a beneficial use.

5. On November 28, 1988, the Department received a third request for an additional four (4) months to complete the project.

6. A temporary extension was subsequently granted on November 29, 1988, and the pertinent portions of the Application for Extension of Time were published in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source on December 21, 1988. The notice stated the application was requesting an additional one year in which to perfect the project. Two timely objections were received from Anne Lee Purdy and George L. and Gwynn M. Taylor, each alleging that the Applicant has not diligently pursued perfection of the appropriation.

7. On December 12, 1988, the Department received a Notice of Completion of Permitted Water Development Form from the

Applicant, attesting the water development had been completed and water put to beneficial use in accordance with the terms of the permit.

8. In Exhibit No. 1, the second page of the progress report describes the work performed in December of 1988 in order to bring the hydropower plant on line for commercial power production. The monthly report in this exhibit also shows the plant producing power from December 12 to December 31 of 1988. The Applicants also testified the plant has been on line since then.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule appearing fulfilled, the matter is properly before the Examiner.

3. The Applicant for the Extension of Time must show reasonable diligence of good faith effort towards the completion of the appropriation works and putting water to a beneficial use. See In the Matter of the Application for Extension of Time to Perfect Beneficial Water Use Permit No. 39787-s76M Transferred to Marvin and Mary Ann Rehbein, Proposal for Decision, June 16, 1988, pp. 5-9 (Final Order, January 24, 1989).

4. Granting of a previous extension is prima facie evidence of reasonable diligence on the part of the Applicant prior to that extension. See In the Matter of the Application for Extension of Time to Perfect Beneficial Water Use Permit No. 24875-g41H, City of Belgrade, Proposal for Decision, p. 6.

5. The Department automatically processes an Application for Extension of Time for a period of one year when an applicant's request for additional time is less than a year. The Objectors and other water users were noticed of the additional year in the public notice. (Findings of Fact No. 6)

6. The Applicant has completed the appropriation works on this project and has started applying water to a beneficial use. (Findings of Fact No. 7 and 8). The evidence shows the Applicant has exercised reasonable diligence toward the perfection of the permit and there is good cause to issue the extension.

WHEREFORE, the Examiner proposes the following:

PROPOSED ORDER

The Application for Extension of Time to Perfect Beneficial Water Use Permit No. 53070-s41G by Gerald and Glenda Ohs is hereby granted. The Permittee shall put the water to a beneficial use in the amounts specified in the Permit no later than November 30, 1989, and the Notice of Completion of Permitted Water Development, Form 617, shall be filed with the Department on or before November 30, 1989.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. Section 2-4-623, MCA.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

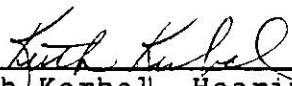
Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in

this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 7th day of April, 1989.



Keith Kerbell, Hearing Examiner
Department of Natural Resources
and Conservation
1537 Avenue D, Suite 105
Billings, MT 59102

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION In the Matter of the Application for Extension of Time on Beneficial Water Use Permit No. 53070-s41G granted to Glenda & Gerald Ohs was duly served upon all parties of record at their address or addresses this 17th day of April, 1989, as follows:

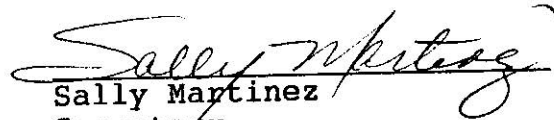
Gerald & Glenda Ohs
P.O. Box 152
Harrison, MT 59735

Anna Lee Purdy
508 No. 15th
Bozeman, MT 59715

Scott Compton
Field Office Manager
Bozeman Field Office
1201 East Main
Bozeman, MT 59715

George L. & Gwynn M. Taylor
P.O. Box 6383
Los Osos, CA 93412

Kathleen A. Cullen, Atty.
P.O. Box 1271
Bozeman, MT 59711-1271


Sally Martinez
Secretary

CASE # 53070